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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 503

ALBERT TINNIN,
Petitioner,

vs.

CLINTON T. DUFFY, Warden of the State Prison at San Quentin, California, etc.,
Respondent.

RESPONDENT'S ANSWER TO APPLICATION FOR WRIT OF CERTIORARI.

STATEMENT OF PROCEEDINGS.

This proceeding on certiorari may be considered with *Egan v. State of California,* No. 370, and *Egan v. The People of the State of California and Clinton T. Duffy, Warden,* No. 436, which involve petitions on certiorari from the same offense, now pending in this Court and in which the issues raised are similar to those in the instant proceeding, save the question

of alleged "mob frenzy" which it is said was engendered by the fact Egan was a public official.

Albert Tinnin, petitioner herein, was jointly charged with Frank Egan and Verne Doran with the murder of Jessie Scott Hughes on June 6, 1932. A separate trial was granted Verne Doran who turned state's evidence against Egan and Tinnin and who was permitted by the trial judge to withdraw his plea of not guilty of the murder charge and enter a plea of guilty to manslaughter. Separate trials were denied Egan and Tinnin.

On September 14, 1932, Egan and Tinnin were found guilty by a jury of first degree murder. Motions by both for the dismissal of the indictment were denied by the Court as were motions for an advised verdict, for a new trial and in arrest of judgment. Sentences of life imprisonment were imposed upon each of them.

An appeal was taken by Tinnin to the District Court of Appeal, First Appellate District, upon which the judgment was affirmed. A motion for a rehearing by said Court and a motion for a hearing by the State Supreme Court were denied. (*People v. Tinnin,* 136 Cal. App. 301, 28 Pac. (2d) 951, to which reference is made for a fuller statement of the facts.)

On February 2, 1942, a petition for a writ of habeas corpus was jointly filed in the State Supreme Court by Egan and Tinnin, charging the introduction of perjured testimony knowingly by Doran and the prosecuting officials, which issue was referred to a

referee whose findings proved adverse to both Egan and Tinnin. Exceptions to the findings were filed by petitioners in the State Supreme Court and upon a hearing thereon said Court found adversely to petitioners. The writs were discharged and petitioners remanded to custody. (*In re Egan and Tinnin,* 24 Cal. (2d) 323, 149 Pac. (2d) 693.)

From the decision of the State Supreme Court a petition on certiorari was filed in this Court by Egan, which was denied. (*Egan v. California,* 65 S. Ct. Rep. 272.)

The instant petition filed in this Court is prosecuted from the denial of a subsequent petition on habeas corpus filed in the State Supreme Court.

THE GROUNDS ASSIGNED UPON WHICH IT IS CONTENDED THIS COURT MAY ASSUME JURISDICTION.

It is urged that jurisdiction is warranted because petitioner's conviction was contrived without due process of law, contrary to the provisions of sections 681, 682 and 1111 *Penal Code* of the State of California, and in violation of section 13 of Article I of the *State Constitution* and of the 5th and 14th Amendments to the *Constitution of the United States.* The facts in support of the grounds above stated are substantially as follows:

(a) (I-a) That petitioner was held to answer upon a void indictment for a capital offense.

(b) (I-b) That petitioner was tried by a Court without jurisdiction of his person.

(c) (I-c) That the conviction of Verne Doran, an accomplice, was obtained by threats of prosecution upon a charge of murder in the first degree and of robbery, first degree, and upon a promise that if he would confess and implicate Frank Egan, a co-defendant, that Egan told him to kill Mrs. Jessie Scott Hughes, he would be permitted to plead guilty to a charge of manslaughter for his part in killing the woman, and that his sentence would be made to run concurrently with his sentence for burglary, and a prior charge of robbery would be dismissed.

(d) (I-e) That petitioner made timely objection to Doran's testimony at the trial and moved for a directed verdict upon the ground of lack of corroboration of the testimony of Doran.

(e) (I-g) That petitioner was indicted upon the sole testimony of Doran before the grand jury, obtained on leading and suggestive questions.

(f) (I-h) That petitioner was prejudiced by being required to stand trial jointly with Egan because of "mob frenzy" engendered by the accusation against a public official, as indicated by the bitter feeling between Golden, the District Attorney, and Hallinan, counsel for Egan, and the attitude of the trial Court, culminating in

the expulsion of Hallinan from the courtroom on the ground of contempt.

(g) (III) That the grounds herein stated had not been previously presented to the State Supreme Court upon petition.

(h) (IV) That the application of petitioner in this proceeding was denied in the State Supreme Court without opinion.

(i) (V) That the jurisdiction of this Court is invoked under sections 237(b) and 240(a) of the *Judicial Code* as amended (28 U.S.C.A. section 347).

(j) (VI-b) That where a state statute or constitutional provision is misconstrued or misapplied, this court has jurisdiction.

In some instances the alleged facts and circumstances which it is asserted show a violation of due process in violation of the 14th Amendment to the *Federal Constitution,* are repetitious or overlap and in most cases require an examination not only of the transcript of the record in the trial Court but the transcript of the testimony taken before the referee in the prior habeas corpus proceeding before the State Supreme Court. On page 9 of petitioner's application the following appears:

> "Petitioner relies for the issuance of a writ of certiorari upon the certified record from the Supreme Court of the State of California in the Matter of the Application of Albert Tinnin for

a Writ of Habeas Corpus, Clinton T. Duffy, Warden of the State Prison at San Quentin, California, respondent, Criminal No. 4743 in the records of said Court, a copy of which is hereto attached and hereby made a part hereof for all purposes with the same force and effect as though herein set forth at length, and upon the facts stated herein, and the exhibits herein referred to, and the law applicable thereto."

Certain excerpts only are taken from the record of the trial Court which are set forth in petitioner's record before this Court, which appear insufficient in the event it is deemed essential to determine the presence or absence of a substantial federal question. However, from an examination of the record on this proceeding and the excerpts of the testimony taken from the record of the trial Court, it seems clear no substantial federal question is presented; they simply involve local rules of practice and procedure applied in accordance with established precedent, consonant with the *Federal Constitution*. The remedy sought on habeas corpus is a collateral attack on the judgment of the trial Court rendered more than thirteen years ago, which imposes the burden of proof on petitioner by a preponderance of substantial credible evidence.

Johnson v. Zerbst, 304 U. S. 458, 468, 82 L. Ed. 1461;

In re Egan, 24 Cal. (2d) 323, 339, 149 Pac. (2d) 693;

In re Mooney, 10 Cal. (2d) 1, 73 Pac. (2d) 554.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY PETITIONER TO ENABLE THIS COURT TO ASSUME JURISDICTION.

It seems trite to cite authority in support of this proposition.

Honeyman v. Hanan, 300 U. S. 14, 18, 81 L. Ed. 476;

Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066.

(a) Petitioner has failed to bring his application within the provisions of sections 237(b) or 240(a) of the *Judicial Code* (28 U.S.C.A. 344, 347).

Section 240(a) of the *Judicial Code* has no application to state Courts, nor has the petitioner drawn into question a state statute or state constitutional provision repugnant to the *Federal Constitution* as required by section 237(b), *Judicial Code,* in order to enable this Court to assume jurisdiction. It is not said sections 681, 682 and 1111 *Penal Code* of California, nor section 13 of Article I of the *State Constitution* impinge upon the 14th Amendment to the *Federal Constitution,* and the 5th Amendment has no application to state procedure. It is argued the state Courts violated the provisions of these Code sections which constituted a violation of the *Federal Constitution.* In other words the provisions of these sections of state law have simply been misconstrued or misapplied. The construction of these penal statutes and of section 13 of Article 1 of the *State Constitution*

does not involve due process. Under the circumstances they are matters of local concern only.

Frank v. Mangum, 237 U. S. 309, 325, 326, 59 L. Ed. 969;

Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. Ed. 270;

Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859.

The trial and conviction of petitioner were conducted in accordance with the fundamental principles of liberty and justice as required by the *Federal Constitution.*

(b) The indictment was returned by the grand jury in accordance with the established law and procedure of the State of California, which does not deny due process to petitioner.

The assertion that the indictment under which petitioner was tried and convicted was void and the Court, therefore, lacked jurisdiction to try petitioner, is based upon the claim that it was returned by the grand jury upon the uncorroborated testimony of Doran, an accomplice. Our State Supreme Court has held that the validity of an indictment may be tested by a petition for a writ of prohibition. (*Greenberg v. Superior Court,* 19 Cal. (2d) 319, 321, 322, 121 Pac. (2d) 713.) It may also be tested by a motion for a new trial and from an appeal taken from the judgment. It does not appear this ground was raised in any of the remedies open to him. (*People v. Tinnin,* 136 Cal. App. 301, 28 Pac. (2d) 951.) And the State Supreme Court has further held that the testimony

of an accomplice before the grand jury need not be corroborated. (*Greenberg v. Superior Court,* 19 Cal. (2d) 319, 121 Pac. (2d) 713.) Nor is the competency of the evidence introduced before a grand jury open to review by the state Court. (*People v. Best,* 13 Cal. App. (2d) 606, 57 Pac. (2d) 168.) Nor is it material that leading questions were used before the grand jury. (*Morehouse v. Superior Court,* 124 Cal. App. 38, 12 Pac. (2d) 133.) It is sufficient if some evidence is placed before the grand jury in which event the Courts will not inquire into its sufficiency. (*Greenberg v. Superior Court,* supra.) Indeed, this Court took cognizance of section 1111, *Penal Code,* in *Lisenba v. California,* 314 U. S. 219, 227, 86 L. Ed. 166, and held it did not involve due process but was a matter solely of state procedure. Hence the issue as to whether corroboration of an accomplice was necessary before the grand jury involved no denial of due process.

(c) Nor did the promise of the District Attorney to apply to the trial Court for clemency or leniency on behalf of Doran as an accomplice, upon the condition he take the witness stand and testify to the truth of the facts, involve due process, and hence contravenes no right or privilege under the *Federal Constitution.* The promise and its performance by the District Attorney shows no proof of a corrupt bargain. Nor was an absolute promise made to Doran by the District Attorney to the effect he would be permitted to plead guilty as an accomplice to man-

slaughter. Thus, on page 117 of petitioner's record the District Attorney in his opening statement to the jury said:

> "* * * he will testify under a promise made to him by the District Attorney's office of this City and County that if he will testify to the whole truth and nothing but the truth, the District Attorney will recommend to the Judge of this court immunity, and with the power exclusively residing in the Judge to determine ultimately, and at some other time, what shall be done with that recommendation."

And Doran testified under cross-examination (page 160 of record):

> "Mr. Hallinan. Q. And you said you also read the statement that the District Attorney had procured from the Bar Association and the Police Commission, an authorization or recommendation that you should be extended leniency, didn't you?
>
> A. I was told by my mother and attorney that the District Attorney's office and the police would recommend to the court, and it was entirely up to the court, any leniency showed towards me."

The promise given under the circumstances here disclosed shows no corrupt bargain, and it has been recently so held by this Court in *Lisenba v. California,* 314 U. S. 219, 227, 86 L. Ed. 166. Nor can the recommendation of the Bar Association and members of the Police Department to the District Attorney make that corrupt which is not corrupt in the first instance.

Let it be understood that we are not here concerned with a confession by Doran since such confession, if any, was not introduced in the evidence or referred to by the District Attorney in the trial of the case. Doran was called as a witness at the trial and testified under oath, subject to cross-examination, and under the protection of the Court. Moreover, the frankness of the District Attorney in stating to the jury his conditional promise to Doran and its verification by interrogating the witness shows the good faith of the transaction in the light of which the jury had the opportunity to pass upon the credibility of Doran's testimony. We may add further that in 1938 at a time when the parole of Doran had expired and he was a free man and the statute of limitations had run against any charge of perjury which may be made against him, he emphatically stated he had spoken the truth as a witness at the trial and during cross-examination on a hearing before the referee on a prior habeas corpus proceeding. (*In Re Egan,* 24 Cal. (2d) 323, 334, 335, 149 Pac. (2d) 693.) And, finally, the alleged statement appearing under subdivision (c) on page 2 of the petition alleges a promise only to confess and implicate Egan. There is no charge of any similar promise as to petitioner.

(d) The alleged objections interposed during the course of the trial to the testimony of Doran on the ground the evidence was insufficient to corroborate his testimony at the trial of the case has already been answered to the effect that it is a matter only of local concern which does not involve the denial of

due process. (*Lisenba v. California,* 314 U. S. 219, 86 L. Ed. 166.) Questions as to the admissibility of evidence, its conflicts and weight, are matters only of local concern.

Drivers Union v. Meadowmoor Co., 312 U. S. 287, 85 L. Ed. 836;

McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819;

Lyons v. Oklahoma, 322 U. S. 596, 602, 88 L. Ed. 1481.

Indeed, it is not the function of this Court to determine whether the procedure pursued in a state court is consistent with its law.

United Gas Company v. Texas, 303 U. S. 123, 139, 82 L. Ed. 702;

Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. Ed. 270.

Due process has regard to substantive rights under the *Federal Constitution* and is not concerned with mere matters of form and procedure.

Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969.

(e) (I-h) The issue as to the alleged prejudice resulting from the trial of petitioner under a joint indictment is also a matter of local concern and involves no federal constitutional rights.

It is said the accusation against Egan, a public official, created "mob frenzy" as shown by the bitter feeling between the District Attorney and Hallinan, counsel for Egan, and the conduct of the Court, culminating in the expulsion of Hallinan from the courtroom on a charge of contempt of court, resulted in

prejudice to petitioner. An appeal was taken from the judgment of contempt and affirmed by the District Court of Appeal. (*In Re Hallinan,* 126 Cal. App. 121, 14 Pac. (2d) 797.)

The joint indictment in trial of Egan and Tinnin was a matter within the discretion of the trial Court which may not be disturbed in the absence of a palpable abuse of discretion. On the appeal taken by Tinnin to the District Court of Appeal (*People v. Tinnin,* 136 Cal. App. 301, 28 Pac. (2d) 951), the point was raised and considered by the District Court of Appeal (petition for hearing denied by State Supreme Court), wherein it was held there was no abuse of discretion under the law of the State of California.

Hallinan did not represent petitioner, who was represented by Nathan Coghlan, an attorney, in the trial of the case, and it is difficult to understand how the conduct of an attorney under such circumstances could react to his detriment to the extent of denying him due process. Nor will this Court ignore the fact that the point in dispute was considered by the District Court of Appeal twice and by the State Supreme Court adversely to petitioner, a point which solely involves local procedure.

Frank v. Mangum, 237 U. S. 309, 335, 336, 59 L. Ed. 969;

Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. Ed. 270.

There is not an iota of evidence in the record showing the trial Court was within the grip of "mob

frenzy", much less by the incident resulting in the contempt proceeding against Hallinan. Surely a trial Court has the inherent power to preserve its decorum in maintaining orderly procedure. And it seems unusual the first time a charge of mob violence or frenzy is made by Tinnin in this Court is in the instant proceeding. No mention of it was made in his appeal from the judgment and will not be here considered for the first time. The charge of mob violence, however, appears in the prior joint petition on habeas corpus in the State Supreme Court taken by petitioner and Egan, which was carried on certiorari to this Court. (*Egan v. California,* 65 S. Ct. Rep. 272.) No evidence was introduced before the referee nor before the State Supreme Court to support the charge, which was apparently abandoned. The fact that no written opinion was filed by the State Supreme Court in its denial of petitioner's application in the instant proceeding indicates the charge lacks substantiality. Indeed, the record is barren of any evidence of mob violence or frenzy, no affidavits, or other exhibits accompanied the instant petition in the State Supreme Court, save the bald accusation above outlined, under which circumstances the State Supreme Court was justified in denying the petition. (*Hysler v. Florida,* 315 U. S. 411, 86 L. Ed. 932.)

The charge that Egan and Tinnin should not have been jointly tried upon the ground that Egan if guilty at all was guilty for solicitation, a lesser offense under section 653(f) *Penal Code,* is not only without merit but cannot concern petitioner herein. A solicita-

tion, which is made punishable under section 653(f) *Penal Code,* is an offense which does not eventuate in the commission of the substantive offense. (*People v. Baskins,* 72 A.C.A. 913, 165 Pac. (2d) 510.) Egan is guilty as a principal under section 31, *Penal Code.*

CONCLUSION.

Petitioner had a fair and impartial trial. He was represented by able counsel and adjudged guilty by a competent jury which recommended a life sentence although the evidence was sufficient to justify the death penalty. The Court had jurisdiction over petitioner and tried him under established rules of law and procedure which in no instance denied him any federal constitutional right or privilege.

It is submitted the petition and the record filed in support of it present no substantial federal question to enable this Court to assume jurisdiction, in view of which the petition on certiorari herein should be denied.

Dated, San Francisco, California,
October 2, 1946.

Respectfully submitted,
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